United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-1060

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1060

UNITED STATES OF AMERICA,

Appellee,

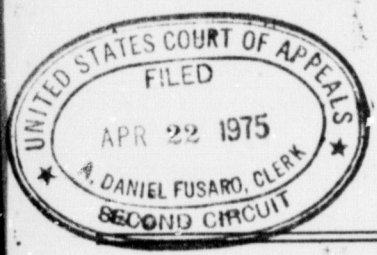
—v.—

RICHARD BARRY,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF AND APPENDIX FOR THE APPELLANT



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STATUTES INVOLVED

Title 21, United States Code, Section 846:

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Pub. L. 91-513, Title II, § 406, Oct. 27, 1970, Stat. 1265

Title 21, United States Code, Section 841 (a) (1):

§ 841. Prohibited acts A—Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

Title 18, United States Code, Section 3501:

§ 3501. Admissibility of confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply

in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing

Added Pub.L. 90-351, Title II § 701(a), June 19, 1968, 82 Stat. 210, and amended Pub.L. 90-578, Title III, § 301(a) (3), Oct. 17, 1968, 82 Stat. 1115.

HISTORICAL NOTE

1968 Amendment. Subsec. (c). Pub. L., 90-578 substituted "magistrate" for "commissioner" in three instances.

Legislative History: For legislative history and purpose of Pub.L. 90-351, see 1968 U.S. Code Cong. and Adm.News, p. 2112. See, also, Pub.L. 90-578, 1968 U.S. Code Cong. and Adm.News, p. 4252.

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-1060

UNITED STATES OF AMERICA,

Appellee

—v.—

RICHARD BARRY,

Appellant

BRIEF FOR THE APPELLANT

ISSUE PRESENTED

Did the District Court err in failing to instruct the jury specifically to give such weight to the defendant's alleged admissions as the jury feels they deserve under all the circumstances?

Statement of the Case

The defendant, Richard Barry, was indicted on or about November 16, 1973, for violation of *21 U.S.C. 846*, conspiracy to violate *21 U.S.C. 841 (a) (1)*, knowingly and intentionally possessing quantities of amphetamine with intent to distribute and dispense same and knowingly and intentionally distributing and dispensing quantities of amphetamine. The defendant was arrested by federal agents on November 29, 1973 and subsequently pleaded not guilty to the one count indictment.

The case was tried to a jury of twelve, before Blumenfeld,

J., on November 26 and 27, 1974 in United States District Court at Hartford, Connecticut, and a verdict of guilty was rendered.

On February 3, 1975, the Court, Blumenfeld, J., sentenced the defendant to the custody of the Attorney General of the United States for a period of three years.

The defendant filed a timely Notice of Appeal on February 13, 1975.

Statement of Facts

The Government's charge, essentially, was that the defendant, Barry, had, during the summer of 1973, sold certain quantities of amphetamine to one, Russell Thomas, at Barry's apartment in New Britain, Connecticut, and that Thomas had, in turn, sold the amphetamine to others, including a government agent. Barry admitted having Thomas, a long time friend, at his home, on several occasions, but denied ever selling amphetamine to Thomas. It was undisputed that the only one to whom Barry had sold amphetamine, if he had done so, was Thomas and that the only ones present during the alleged sale were Barry and Thomas, government agents thereby having no direct knowledge of any conversation between Barry and Thomas, a point noted by the Court in its charge to the jury, (Appendix, Pg. 8a).

The government's case relied primarily upon the testimony of Thomas, an accomplice who had already pleaded guilty and was awaiting sentencing at the time of the Barry trial, and certain alleged admissions made by Barry after his arrest and during questioning. The government also offered evidence of surveillance of Barry's neighborhood.

During the trial, defense counsel objected to a question posed to a government agent as to what oral self-incriminating statements the defendant made after his arrest and while in custody (Tr. pgs. 40-41),* on the basis that such statements,

*References marked (Tr. p.) refer to the trial transcript.

if elicited, were elicited in violation of his constitutional rights, in that during the period the statements were allegedly made, defendant was both threatened by a government agent and was denied assistance of counsel. The Court held a hearing out of the presence of the jury, at which the defendant testified to such violations. (Tr. pgs. 52-55). The Court then denied the motion to suppress (Tr. pg. 62), and the statements were admitted into evidence. Subsequently, the defendant, in the presence of the jury, denied having made these statements and testified that he was threatened by a government agent and denied assistance of counsel during the period when the statements were allegedly made (Tr. pgs. 167-9).

The following paragraph was included in the defendant's request to charge:

"4. If it appears from the evidence in the case that an admission would not have been made, but for some threat of harm or some offer or promise of immunity from prosecution, or leniency in punishment, or other reward, such an admission should not be considered as having been voluntarily made, because of the danger that a person accused might be persuaded by the pressure of hope or fear to confess as facts things which are not true, in an effort to avoid threatened harm or punishment, or to secure a promised reward.

If the evidence in the case leaves the jury with a reasonable doubt as to whether an admission was voluntarily made, then the jury should disregard it entirely.

The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence." *Federal Jury Practice and Instructions* (Civil and Criminal) Devitt and Blackmar, Second Edition, Vol. I Sec. 11.17, Pgs. 232-233.

The Court specifically refused to give this charge, and the defendant objected and excepted to such refusal (Tr. pgs. 265, 266).

The Court, in its charge to the jury, made no mention whatsoever of the defendant's alleged admissions or any of the circumstances under which they were obtained.

ARGUMENT

THE DISTRICT COURT ERRED IN FAILING TO INSTRUCT THE JURY SPECIFICALLY TO GIVE SUCH WEIGHT TO THE DEFENDANT'S ALLEGED ADMISSIONS AS THE JURY FEELS THEY DESERVE UNDER ALL THE CIRCUMSTANCES.

1. *Title 18, U.S.C. 3501 (a)* clearly requires the Trial Court to instruct the jury on the issue of the voluntariness of defendant's admissions as to the weight to be afforded to them. *Title 18 U.S.C.* § *3501 (a)*, (1970) reads as follows:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and *shall* instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances." (emphasis added).

Paragraph (e) reads as follows:

> "(e) As used in this section, the term 'confession' means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing."[1]

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[1] (Lego v. Twomey, 404 U.S. 477 (1972), did not consider 18 U.S.C. 3501 (a), it having been enacted after the trial in that case.)

The defendant requested the Court to charge the jury on this issue. (See Statement of Facts above or Appendix, pg. 3a). The request was denied, and the defendant objected and excepted to such denial (Tr. pg. 265, 266, Appendix pg. 9a).

The Court failed to give such instructions, *making no mention whatsoever of the admissions or the circumstances under which they were obtained.*

2. This failure to give instructions in accordance with *18 U.S.C. 3501 (a)* was declared to be error in *United States* v. *Bernett*, 495 F. 2d 943, 962 (United States Court of Appeals, District of Columbia Circuit, 1974), even though the defendant failed to request an instruction on that point and failed to object to its omission: ". . . The charge made no mention whatsoever of the admission to Officer Schleig, and defense counsel neither requested the Court to instruct the jury on that matter nor objected to its failure to do so. We are mindful of the general rule that 'no party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires . . .' It is equally clear, however, that we may overlook a lack of objection where the defect in the instructions amounts to plain error affecting substantial rights of the accused. In view of the unequivocal statutory mandate that an instruction be given as to the weight which might be accorded a confession or admission received in evidence, the omission of the instruction in this case was error of the plainest sort." On pg. 961, the Court stated: "My colleagues and I hold unanimously that the omission was error . . ." On pg. 962, the Court cited *Kotteakos* v. *United States*, 328 U.S. 750 (1946) to the effect that "the verdict should stand 'except perhaps where the departure is from a constitutional norm or a specific command of Congress.' The quoted language is troubling in view of the fact that the error here consisted in the disregard of a 'specific command of Congress'." The Court, however, found the error to be harmless, primarily because the defendant, Bernett, substantially repeated the admission during his testimony at trial. That was not the situation in this case. The defendant, Barry, made no incriminating admissions at his trial.

3. A "standard charge," "to consider and weigh the evidence," as given in this case (Tr. pg. 240), without specifically mentioning the confession, is not sufficient to comply with *18 U.S.C. 3501 (a)*, for the following reasons:

(a) The wording of the statute specifically says: ". . . instruct the jury to give such weight to the *confession* . . ." (emphasis added).

(b) The last sentence of *18 U.S.C. 3501 (a)* should be read as a whole, and so read, relates the evidence on the issue of voluntariness that the jury has heard, to the instructions. Also, if specific instructions were not to be given, why specifically permit the jury to hear evidence on the issue of voluntariness?

(c) If the "standard" charge, which is always given, were intended to be sufficient, there would have been no need to include the wording, "and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances," in the statute.

(d) *Legislative History: 18 U.S.C. 3501* evolved from *Title II of the Omnibus Crime Control and Safe Streets Act of 1968*. There was concern expressed, particularly by opponents, that parts of Title II, other than the above wording, were "intended directly to overrule the Supreme Court decisions in the Miranda and Mallory cases." Senator Tydings, *Cong. Record:* Senate-Vol. 114-Part 9, Pg. 11891, 90th Congress, Second Session, May 6, 1968. "The Senate version of Title II modifies the rule on voluntariness of confessions as set forth in the case of Miranda v. Arizona . . .", Congressman Rogers of Florida, *Cong. Record-House: Vol. 114, Part 12*, 90th Congress, Second Session, pg. 16273, June 6, 1968.

Recognizing this concern, the aforementioned language to instruct the jury was included. The Senate Judiciary Committee Report on S917, the bill which was eventual-

ly enacted, stated: "There is the added safeguard that the jury must be instructed to give the confession or statement the weight that they feel it warrants under all the circumstances." *1968 U.S. Code Cong. and Adm. News* Pg. 2112 at Pg. 2137. As Senator Scott said, "Should he (the trial judge) find the statement voluntary, he will permit the jury to consider it with the instruction that it should be given no more weight than the circumstances warrant." *1968 U.S. Code Cong. and Adm. News* 2112, 2263. It is clear from these statements alone that the Congress wanted more than the "standard charge" to be given.

Also, the Congress was apparently sufficiently concerned about a defendant being denied assistance of counsel during questioning to include it specifically as a factor which should be considered by the judge in determining voluntariness. *18 U.S.C. 3501 (b) (5)*. Since such denial of assistance of counsel, also a violation of the defendant's Miranda rights, was an issue in the defendant, Barry's trial, it was particularly important in Barry's case that specific instructions on voluntariness be given to the jury.

Senator McClellan believed in the importance of the *jury* considering and weighing voluntariness, as well as the judge. " . . . the test of admissibility should, therefore, rest upon the circumstances in each individual case and should be applied by those best able to make the determination . . . our trial judges and juries who hear and see the witnesses as they testify." *Cong. Record: Senate, Vol. 114*-Part 9, 90th Congress, Second Session, pg. 11207, May 1, 1968. It is reasonable to conclude, therefore, that Senator McClellan believed the importance of the jury's considering and weighing voluntariness, required specific instructions to that effect.

Also, leaving the weight to be given to the confession to the jury is also mentioned in 18 U.S.C. 3501 (c),

further evidence of the importance Congress attached to this point.

(e) The *importance* of the *jury* weighing the voluntariness of the confession or admission, as described in several Court decisions, (either as to admissibility in decisions prior to *Lego* v. *Twomey*, supra, or as to the weight it should be given regardless of admissibility) shows the Courts' concern that the jury specifically consider voluntariness, and supports the proposition that specific instructions, beyond the standard charge, should be given

Although *Lego* v. *Twomey*, supra, rejected the constitutional right of the jury to determine admissibility, it did indicate that it was important that the jury consider the weight to be given to the confession. At page 485, the Court, in commenting on *Jackson* v. *Denno*, 378 U.S. 368 (1964), stated: "Nothing in Jackson questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as free since Jackson as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness. In like measure, of course, juries have been at liberty to disregard confessions that are insufficiently corroborated or otherwise deemed unworthy of belief."

Also, if the jury is not to consider admissibility, then the only point of its hearing evidence on voluntariness is to consider that issue in the weight it gives to the confession.

In *Clifton* v. *United States*, 371 F. 2d 354, 360 (United States Court of Appeals, District of Columbia Circuit, 1966), the Court stated: "If the determination of the District Judge is to submit the confession to the jury,

however, he should not indicate that he has made a preliminary decision that it was voluntarily made, but he should specifically instruct that they are not to give any weight to the confession unless *they*, as ultimate fact finders, are satisfied beyond a reasonable doubt on all the evidence that it was voluntarily given by the accused."

In both *United States* v. *Inman*, 352 F. 2d 954 (4th Circuit 1965) and in *Stevenson* v. *Boles*, 331 F. 2d 939 (4th Circuit 1964), the Court ruled for the defendant, holding that the trial judge must specifically instruct the jury, even in the absence of a request, on the issue of voluntariness, beyond instructing the jury of its right and duty to assay believability of witnesses. (*United States* v. *Anderson*, 394 F. 2d 743 (2nd Circuit 1968) is distinguished from *United States* v. *Inman* and *Stevenson* v. *Boles*, supra, because in *United States* v. *Anderson*, the issue of voluntariness was not questioned. It *was* an issue in this case, however, the defendant, Barry, having denied both voluntariness and the admissions, as the defendant did in *Stevenson* v. *Boles*, supra. Also, in this case, a request to charge on this issue was made by the defendant, Barry, as opposed to *Anderson*, where one was not made. If a request had been made in *Anderson*, the Court might well have ruled that this issue should have been submitted to the jury.)

In *Kerr* v. *United States*, 369 F. 2d 78, 84 (9th Circuit 1966) the Court said: "An instruction advising the jury that the evidence relating to the making of a confession may be considered by them in determining the credibility of the confession, would have been appropriate."

(f) The need for specific instructions is highlighted by the Court's concern about the jury's ability to understand the issue of voluntariness " . . . the jury, however, may find it difficult to understand the policy for-

bidding reliance upon a coerced, but true, confession . . . . " *Jackson* v. *Denno*, supra, 382.

(g) Further support for giving specific instructions concerning the weight to be given to the confession is found in the fact that many courts have considered it important to give specific instructions and have done so. In the recent case of *Government of Virgin Islands* v. *Gereau*, 502 F. 2d 914, 934, 935, (3d Circuit 1974), the charge included: "The jury may consider evidence as to the voluntariness of the confessions which have been admitted into evidence, and then give the confessions such weight as you believe they deserve under all the circumstances. If you decide that one or more, or all of these confessions which have been admitted into evidence, are entitled to no weight, because you find that they have been obtained as a result of brutalities practiced upon the defendants concerned, then you may disregard them totally."

United States v. *Adams*, 484 F. 2d 357, 362 (7th Circuit 1973) found that the District Court complied with *18 U.S.C. 3501 (a)* by stating: "However, it is for the jury to determine the credibility and weight to be given such statement with respect to defendant's innocence or guilt."

Specific instructions as to voluntariness and weight to be given to the confession were held to be proper in *United States* v. *Thomas*, 475 F. 2d 115, 117 (10th Circuit 1973); in *Kulyk* v. *United States*, 414 F. 2d 139 (5th Circuit 1969); *United States* v. *Doyle*, 373 F. 2d 875, 879 (2d Circuit 1967); and *United States* v. *Strickland*, 493 F. 2d 182, 186 (5th Circuit 1974).

4. The alleged admissions by the defendant, Barry, were critical in the jury's determination of its verdict, and the trial court's failure to instruct the jury properly on the weight to be given to the admissions misled the jury into giving more weight to the admissions than the circumstances warranted,

precisely the concern expressed by Senator Scott in paragraph 3 (d) above. The jury may have thought that the admissions into evidence of the defendant's statements by the Court meant that they were reliable, [" . . . the influence of the trial judge on the jury is necessarily and properly of great weight and his lightest word or intimation is received with deference, and may prove controlling." *Quercia* v. *United States*, 289 U.S. 466, 470, (1932)], and without the Court giving the specific instructions required by *18 U.S.C. 3501 (a)*, the jury was led into accepting the admissions as reliable without giving sufficient weight to the circumstances surrounding their voluntariness, which circumstances are the very basis of determining their reliability. (See *Jackson* v. *Denno*, supra.)

If the jury had given little, or no weight, to the defendant's admissions, there might well have been no conviction. The only testimony that Barry was the seller came from Russell Thomas, an accomplice who had already pleaded guilty and was awaiting sentencing at the time of his testimony, points raised by defense counsel to impeach him. He was the only possible direct link to Barry, it being undisputed that he was the only one who had a conversation with Barry, regarding a sale, if anyone did (a point noted by the Court in its charge to the jury, Appendix pg. 8a). During Thomas' sale to government agents, he never mentioned Barry by name. Thomas allegedly made comments or references to the agents as to certain "facts" or "circumstances" which, it was claimed, implicated Barry if tied in with other circumstantial evidence, but these statements were clearly suspect, possibly being an attempt by Thomas to pass himself off as a middleman, to create a "connection" when he, Thomas, was in fact the "connection" or "supplier" himself. All of Thomas' statements, both at trial and during the sale by him, were suspect as the testimony or statements of an accomplice, and, without the defendant's admissions, were essentially uncorroborated, the balance of the evidence being weak and circumstantial. The trial court recognized that the testimony of the accomplice, Thomas, was suspect and insufficient without corroboration when it instructed the jury to examine the testimony of Thomas, as an accomplice, with great scrutiny. (Tr. pgs. 261-2; Appendix Pg. 9a).

Therefore, the defendant's admissions were critical. If they had not been given weight by the jury, the accomplice's suspect, impeached and substantially uncorroborated testimony would not have been sufficient to result in a conviction. See *United States* v. *Goss*, 484 F. 2d 434, 437 (6th Circuit 1973). " . . . . our unwillingness to find that, without the confession, the evidence of appellant's guilt was overwhelming."

CONCLUSION

For the foregoing reasons, the defendant-appellant, respectfully moves that the judgment of conviction of the District Court be vacated and set aside.

Respectfully submitted,

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CERTIFICATION

This is to certify that two copies of the foregoing Brief and Appendix for the Defendant-Appellant have been mailed, postage pre-paid, to Peter Dorsey, United States Attorney, 450 Main Street, Hartford, Connecticut, on or before April 23, 1975.

RICHARD M. RITTENBAND,
Attorney for the Defendant-Appellant

APPENDIX

CONTENTS

I — Paragraph 4 of Defendant's Request To Charge:

"4. If it appears from the evidence in the case that an admission would not have been made, but for some threat of harm or some offer or promise of immunity from prosecution, or leniency in punishment, or other reward, such an admission should not be considered as having been voluntarily made, because of the danger that a person accused might be persuaded by the pressure of hope or fear to confess as facts things which are not true, in an effort to avoid threatened harm or punishment, or to secure a promised reward.

If the evidence in the case leaves the jury with a reasonable doubt as to whether an admission was voluntarily made, then the jury should disregard it entirely.

The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence." *Federal Jury Practice and Instructions* (Civil and Criminal), Devitt and Blackmar, Vol. I Sec. 11.17, Pgs. 232, 233.

II. Pages 40-41 of Transcript: Objection To Admissions.

Q. Was this all the normal procedure when someone is placed under arrest?

A. Yes, it is.

Q. Did Richard Barry make any statements at that time?

A. While we were processing him?

Q. Yes.

A. Not then. But subsequently, later.

Q. Subsequently did he make statements?

A. Yes, he did.

Q. What did he say?

MR. RITTENBAND: Objection.

THE COURT: I don't know.

Are you fellows talking confidentially between yourselves or what?

Are you able to hear this questioning and answers, all of you on the jury?

MR. RITTENBAND: I have an objection, your Honor.

If he is going to go into the statements allegedly made by the defendant on the basis of what I discussed before the jury was impaneled, that any alleged statements made by the defendant were in violation of his Constitutional rights. We would have evidence to prove that.

I would like an opportunity to have Mr. Barry testify to that before any of these alleged statements are repeated or made by the witness.

III. Pgs. 52-55 of Transcript — Defendant's Testimony, *before the Court only*, of Government coercion and denial of assistance of counsel.

Q. Now, when you got here and they started to question you did you at that time make any requests?

A. Yes. I wished to call my lawyer. I told them three, four, maybe five times, if I could call my lawyer. And they said, "Later". They kept on saying, "Later, later".

And finally after I've gone through the whole two hours, two and a half hours, and they let me out the door, they said, "Now you can call your lawyer".

Q. All right. Then you made, you say, while you were under questioning, three or four requests —

THE COURT: No, he didn't say that at all.

Just ask questions. Don't try to paraphrase to suit your own purpose.

Q. What type of requests did you make, Mr. Barry, while you were under questioning?

A. I —

THE COURT: While he was under questioning?

MR. RITTENBAND: Yes.

A. I requested to call my lawyer.

Q. And were you permitted to call your lawyer?

A. Not until everything was over.

Q. All right. Now, from the time you arrived at the Federal Building until you appeared before the Magistrate were any other statements made to you by any of the agents, other than questions about the activities?

A. Well, there was this one agent — I don't see him in the courtroom today. He has a big beard and long hair. And they kept on asking me questions about chemists and —

THE COURT: What?

A. They kept on asking me questions about a chemist. And I told them I didn't know any chemists and I didn't know any chemist.

And this other guy, I don't know what agent he was, but he came up to me, looked me right in the face and says: "You fucking punk, I'm going to kick your ass if you don't start answering questions here".

And he did that to me a few times, two or three times during the course of the two hour period.

Q. Did he do anything with his hands during that period of time?

A. I thought I saw him place his hands on I think it was his right gun — his gun on his right hip or something. But he was like two feet away from me, three feet away from me.

All I saw was his face when he sat down and put it up in front of my face and started swearing at me.

Q. And was it prior or subsequent to that that you allegedly made these statements?

A. It was before and during.

Q. And during.

BY THE COURT:

Q. Well, now you made the statement that — well, you said you had sold Speed to Russell Thomas and somebody else?

A. I never said that.

Q. Oh, you didn't say that?

A. No, I never said that.

I didn't say ninety per cent of what he has on his statement.

Q. You didn't admit anything?

A. I — after two hours I told them I would try to see if I could find a chemist for them and try to bust, help them bust this chemist. After two hours they said that's all we want from you is to bust — to break down the laboratory and we'll let you go.

I says, well, okay. After two hours I told them "Okay".

Q. But you didn't admit that you had participated, that you had done anything wrong?

A. No. I didn't admit to I sold Russell anything.

Q. You didn't admit anything?

A. No. No, your Honor.

IV. Pgs. 167-169 of Transcript — Defendant's Testimony, *before the jury*, of Government Coercion and Denial of Assistance of Counsel.

And, well, got there about eight o'clock and I asked them if I could call my lawyer. And they said, "Later". And I figured it was — you know, I figured they meant maybe fifteen twenty minutes later. And they questioned me about chemist and about people and about Russell Thomas. And the majority of it was about a chemist. They wanted me —

THE COURT: About what?

THE WITNESS: About a chemist.

THE COURT: About a chemist?

THE WITNESS: Yes.

THE COURT: A chemist?

THE WITNESS: A chemist.

THE COURT: A particular chemist?

THE WITNESS: Well, they didn't mention a particular name. They just mentioned a chemist.

THE COURT: I see

THE WITNESS: That they wanted a chemist.

A. (Continuing) And I told them I didn't know any chemist. And this went on, and finally one of the Special Agents that is not here, he came up to me, looked me right in the face and says — and he swore, said a lot of profanity. I don't know if I should say it in here.

But he threatened me if I didn't start telling them what they wanted to hear that, you know, he'd beat the shit out of me. But he used stronger words than that.

And he did this three, maybe four times during the two and a half hour interval.

Q. Now, during this questioning did you ever say that you had sold Speed to anyone?

A. No, never.

Q. Did you ever say you had sold amphetamine to anyone?

A. Never.

Q. What did you tell them?

A. Well, I told them I knew Russell and I told them I didn't know the chemist. They asked me about several other people that I never heard of their names before.

Mainly they were just questioning me about a chemist. This was the main topic.

Q. Did you ever tell them that you would try to find the chemist?

A. Well, finally after a while, after about two hours I told them: Lookit, I'll go on the streets and see if I can find the chemist."

Q. Had they let you call your attorney at that point?

A. No, they still refused me. Two or three times before that I questioned if I could call my lawyer. Because, you know, an hour was gone by and they still didn't let me call my lawyer.

Q. And when you said that you would try to find the chemist was that before or after the agent threatened you?

A. That was definitely after.

Q. And how long were you questioned, do you know?

A. Well, from about 8:30 — eight o'clock to about 10:30 or quarter to eleven. I'm not quite sure.

Q. Did you ever get to call your attorney?

A. Yes, after they fingerprinted me and let me loose, then I called my lawyer.

Q. Again let me ask you. Have you at any time since 1971, ever sold any amphetamines or any other kind of drug to anybody here in the State of Connecticut?

A. No. Never.

V. Pg. 240 of Transcript. Charge to Consider and Weigh the Evidence.

"Of course, it is not only your task and your duty, but it is your exclusive province to determine what the facts in the case are and, in making that determination, to consider and weigh the evidence."

VI. Pg. 252 of Transcript. Charge that Thomas was only Person to See Defendant.

"They say, well, we don't have anybody but Mr. Thomas who saw Mr. Barry."

VII: Pgs. 261-2 of Transcript. Accomplice Charge

"And the question is is there something there that makes him testify this way untruthfully.

The point is made that he hopes to receive more favorable treatment at the time of sentence from the Judge because he has come forward and testified.

Now, you might well say and think that one who does come forward to testify, even though he is awaiting sentence, is trying to curry favor with the Court. To an extent in such a case there is some indication that he admits that he was wrong, he admits that he did it and maybe this is a helpful thing to get off his chest as far as rehabilitating him is concerned.

On the other hand, you may feel he is just doing it anyhow and it isn't just because he wants to get something off his chest; he wants to get some advantage.

Well, these are questions you will have to answer for yourself because I am not going to tell you what I'm going to do. I happen to be the sentencing judge. But the point is this is a fact you are pointed to as a basis for asking you to disbelieve him completely, to say this is strictly a made-up story.

You should examine the testimony of an accomplice — and that is what he is on his story — with great scrutiny because there is that element that might affect his testimony."

VIII. Pgs. 265-67 of Transcript: Defendant's Objections and Exception to Charge.

(In the absence of the jury:)

THE COURT: All right. Objections, corrections.

MR. RITTENBAND: I have some, your Honor.

THE COURT: What is it?

MR. RITTENBAND: I am objecting to the Charge because you did not include — You did not emphasize Paragraph 2 of my request.

THE COURT: Paragraph 2.

MR. RITTENBAND: On the question of the possible perjury of someone obtaining concession from the Government.

THE COURT: All right. Next?

MR. RITTENBAND: Paragraph 4.

THE COURT: I was never going to give that.

MR. RITTENBAND: I have excepted to the fact that you did not

THE COURT: No, I was never going to give that one.

MR. RITTENBAND: And Paragraph 5.

THE COURT: Paragraph 5.

Well, I think I covered that pretty well.

Is that it?

MR. RITTENBAND: No.

Paragraph 6 as well.

THE COURT: 6, too.

MR. RITTENBAND: I think there was emphasis on the fact if Mr. Barry has an interest, that no mention was made that he should be considered just as any other witness.

THE COURT: All right.

MR. HARTMERE: Could I ask the Court for a copy of the defendant's Request for Charge? I never received a copy.

THE COURT: All right. I'll grant that.

Anything else, Mr. Hartmere?

MR. HARTMERE: No, your Honor.

THE COURT: Recess till two o'clock.

(Luncheon recess.)

THE CLERK: For the record, your Honor, I have shown the exhibits and the indictment to the attorneys and they have agreed that they can go to the jury as they are.

THE COURT: I think I gave them the substance of the requested charge No. 6 in the defendant's request.

Also as to request No. 5.

So I will not call them back for any further instructions.

You may deliver the exhibits to the jury and tell them they can start their deliberations.

THE CLERK: Thank you, your Honor. I shall.

THE COURT: All right.

MR. RITTENBAND: May my exceptions be noted, your Honor?

THE COURT: Yes, of course. You have an exception.

UNITED STATES COURT OF APPEALS

FOR THE SECOND DIRCUIT

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In the Matter of

UNITED STATES OF AMERICA

VS. Docket No. 75-1060

RICHARD BARRY

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CERTIFICATION OF SERVICE

This is to certify that two copies of the Brief and Appendix for the defendant-appellant were mailed, postage prepaid, to Peter Dorsey, United States Attorney, 450 Main Street, Hartford, Connecticut, on or before April 23, 1975.

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